

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, DC

DECISION AND ORDER

FAA Order

Number: ODR-97-43

Matter: Protest by ADSYTECH, INC.

of Award Pursuant to FAA DTFA01-97-R-02000

Docket: 97-ODR-00042

Served: March 12, 1998

DECISION AND ORDER

Adsytech, Inc. submitted a protest to the FAA's Office of Dispute Resolution for Acquisition (ODRA) alleging improprieties in the award of a contract under solicitation

DTFA01-97-R-02000. Because the protest to the ODRA was untimely, I am dismissing it.

I. FACTUAL BACKGROUND.

The solicitation involved the acquisition of technical support services for the Air Traffic Requirements Service (ARS) for a base period plus two option years. Proposals were received from Adsystech and CGH Technologies, Inc. ('CGH'). Although the two proposals were considered essentially equivalent from a technical standpoint, the award was given to CGH, based on a lower evaluated price proposal.

In this regard, the solicitation had asked for the submission of proposed labor rates in two categories: (1) rates for employees who would work at the contractor's home office ("home office rates"); and (2) rates for employees who would work at a Government site ("on-site rates"). It also advised prospective offerors that the location where work under task orders would be performed would be a matter of Government discretion. The parties are in agreement that, in evaluating price proposals, the contracting officer utilized only the respective offerors' "home office rates," and did not factor "on-site rates" into his computation. According to the Agency's response, this was done, because, as a practical matter, there was no space available at Government facilities to accommodate contractor personnel. In this manner, Adsystech's price proposal was evaluated as 11.5% higher.

II. THE PROTEST

Although it did not so state as part of its proposal, Adsystech alleges in its protest that it had intended to have its employees perform services under the contract from their own homes, as "*telecommuting*" employees, and intended its "on-site rates" to apply to those employees. The "on-site rates" Adsystech proposed were significantly lower, since, unlike the "home office rates," they were not burdened with office overhead. Adsystech's protest alleges that the Agency's method of price evaluation placed it at a disadvantage, since, had the "on-site rates" been used instead, Adsystech's cost proposal would have been the lower one. The protest asserts that the solicitation did not prohibit the use of *telecommuting*, and that since the *telecommuting* rates offered cost advantages to the Agency, its proposal should have been deemed the *best value* under the award scheme of the solicitation.

The Agency response is that *telecommuting* was not contemplated by the solicitation and never included as an aspect of Adsystech's proposal. The Agency further argues that, had the proposal been specific about use of *telecommuting* employees, it would have been "nonresponsive" to the solicitation. Moreover, the Agency contends, the use of *telecommuting* employees would pose an unanticipated risk that should have been evaluated as part of the source selection risk evaluation and that, purportedly, would have served as yet another basis for determining that Adsystech's proposal would result in other than the *best value* to the Government.

I will not address the merits of Adsystech's protest, however, because I find it to have been untimely filed.

III. TIMELINESS

The following facts, derived from Adsystech's protest, related correspondence, the Agency report, and teleconferences between the protester, the Agency, and the ODRA are undisputed:

- Adsystech was notified on March 26, 1997, by letter, that the award under the subject solicitation had been made to CGH Technologies, Inc. That letter from the contracting officer also recommended that Adsystech request a debriefing to learn the specific facts of the award decision.
- Adsystech did, in fact, request a debriefing, which was held on April 15, 1997. A number of technical and price issues were discussed. Included in this discussion was the fact that for evaluation purposes, the contracting officer had used Adsystech's higher, burdened labor rates, rather than its proposed "on-site rates."
- The solicitation contained, at Section I, clause 3.9.1-3, *Protests* (August 8, 1996), which provided, in pertinent part:

(e) . . . Protests must be filed with the Office of Dispute Resolution within 5 business days of the date that the protester was aware, or should reasonably have been aware, of the Agency action or inaction which forms the basis of the protest. If the protester was entitled to and requested a debriefing from the FAA, then any protest must be filed within 5 business days after the date which the FAA makes available for the debriefing.

- Adsystech has contended that the solicitation (SIR) "did not provide any reference to the Protest Procedures." (Protest letter of May 8, 1997). This contention was plainly wrong, in light of the above quoted solicitation clause. It is undisputed that clause 3.9.1-3 was incorporated within the instant solicitation. (*See FAA Initial Response* at 2; Adsystech letter of June 20, 1997.)

- Adsystech has also asserted that, shortly after the April 15, 1997 debriefing, during a telephone conversation, the Contracting Officer had advised it that the contractor could file a protest within ten (10) business days after becoming aware of the basis for a protest. This assertion was not contradicted in the Agency's Initial Response. By the same token, there is no assertion that the Contracting Officer had ever advised Adsystech that it could defer filing a protest with the ODRA, so long as a protest were lodged with the Contracting Officer within the applicable filing period.

- Adsystech states that it had a copy of the Acquisition Management System (AMS) (original July 1996 release), that the original AMS "indicated" a five (5) business day bid protest filing requirement, and that Adsystech so advised the Contracting Officer during their post-debriefing telephone conversation. (See Adsystech letter of June 20, 1997). This statement is factually incorrect. Unlike the above-quoted solicitation clause, the original version of the AMS did not specify any time limitation on the filing of a protest. [1] Instead, Section 3.9.3.2.1.2 of the original AMS called for time limitations to be inserted into solicitation provisions:

"The Office of Dispute Resolution will promulgate protest procedures and time limitations for protest, which will be described in a provision to be referenced or included in FAA SIRs, or provided upon request."

- Apparently, Adsystech's awareness of the five (5) day limitation was as a result of its having read the solicitation clause, either within the instant solicitation or in an SIR for a prior FAA procurement, and not from its having seen the original AMS. The clause clearly calls for the filing of a protest *with the ODRA* within the five (5) business day timeframe. [2]

- By letter dated April 29, 1997, Adsystech filed a protest with the Contracting Officer. This letter was transmitted (and purportedly received) on the tenth business day after the debriefing. No copy and no similar letter was transmitted to the ODRA at that time.

- Adsystech's protest to the ODRA was dated May 8, postmarked May 12, and received in the ODRA on May 19, 1997.

I find that the critical aspect of this matter is that Adsystech was advised unequivocally in the April 15, 1997 debriefing that, for evaluation purposes, its burdened "home office" labor rates had been used, rather than the lower "on-site rates." The protester was advised

of this, and the resulting impact on its evaluated price in the debriefing. At that time, the protester was also advised that price had been an important factor, because both technical proposals were highly rated. Under the terms of the solicitation, if Adsystech disagreed with that evaluation, it was required to file a protest with the ODRA within 5 business days of April 15.

Adsystech points to the post-debriefing telephone conversation with the Contracting Officer as somehow rendering its protest before the ODRA timely. While a particular contracting officer may accept and review allegations from a protester beyond the 5 day period stipulated in clause 3.9.1-3, he or she would have no authority to waive the timeliness requirements of that clause as they pertain to ODRA jurisdiction and review. Irrespective of what the contracting officer was willing to accept, any protest with the ODRA had to be filed within 5 business days of April 15, 1997. Moreover, as noted above, when Adsystech did file its protest within the period specified by the Contracting Officer, it did not do so with the ODRA, but only with the Contracting Officer.

The protester has also argued that the April 15 debriefing was deficient, that the government is still providing information, and that effectively, the debriefing continued beyond April 15, so as to make the instant protest timely. I reject this argument, because the essence of Adsystech's complaint focuses on the evaluation of its proposed labor rates. Adsystech knew unequivocally on April 15 what rates had been used, and why. Under the terms of the solicitation, it had 5 business days from that point to protest to the ODRA.

IV. CONCLUSION

In summary, because the essential facts are not disputed, and the rules set forth in the solicitation were clearly stated, I have determined that this protest to the Office of Dispute Resolution for Acquisition must be dismissed without further consideration.

This is the final Agency order in this matter. To the extent that this decision is subject to review, such review shall be in accordance with 49 USC 46110. A petition for review must be filed with the United States Court of Appeals for the District of Columbia Circuit, or in the Court of Appeals for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the date this order is issued.

_____/s/_____

JANE F. GARVEY

ADMINISTRATOR

Issued this 12th day of March, 1998

[1] *See Protest of Washington Consulting Group, Inc.*, 97-ODR-00059, Decision on Motion to Dismiss First Amended Protest (January 30, 1998).

[2] The current release of the AMS (June 1997) allows for the filing of a protest with the ODRA (1) within seven (7) business days after the date of the agency action or inaction which forms the basis of the protest; or (2) if the protester was entitled to and requested a post-award debriefing from the FAA, within five (5) business days after the date the FAA makes available for the debriefing. AMS §3.9.3.2.1.2 (June 1997).